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No. 91-1234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DOLORES J. RICHARDS,
Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas

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PETITIONER'S REPLY BRIEF

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14

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Federal Due Process Question, Which Forms the Jurisdictional Basis for a Writ of Certiorari, Was Timely, Precisely, and Repeatedly Raised to Both the State Court of Appeals (the Court to Which a Writ of Certiorari is Sought) and the Texas Supreme Court 1

A. The federal due process question was precisely and timely raised to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas 2

B. The federal due process issue was precisely and timely raised to the Texas Supreme Court on Application for Writ of Error and, further, in Richards' Motion for Rehearing 5

II. Far From Being Well-Settled for Over a Century, the Supreme Court has Never Ruled, as Liberty Mutual Claims in its Brief, that a State has Unlimited Authority to Retroactively Apply Changes in Procedural Law That Terminate a Litigant's Constitutionally Protected Property Interest in a Cause of Action 6

TABLE OF AUTHORITIES

CASES: Page

Campbell v. Holt, 115 U.S. 620 (1885) 8
Chambers v. Mississippi, 410 U.S. 284 (1973) 1
Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 7, 8, 10
Eddings v. Oklahoma, 455 U.S. 104 (1982) 4, 5
Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 7
Houston Lighting v. Klein Indep. School. Dist., 739 S.W.2d 508 (Tex. App.-Houston [14th Dist.] 1987) 4
Illinois v. Gates, 462 U.S. 213 (1983) 1
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 7, 8, 10
Martin v. Cohen, 804 S.W.2d 201 (Tex.App. 1991) 4
Mellinger v. City of Houston, 3 S.W. 249 (Tex. 1887) 6
Nagle v. Nagle, 633 S.W.2d 802 (Tex. 1982) 3
New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 2
Street v. New York, 394 U.S. 576 (1969) 5
Taylor v. Kentucky, 436 U.S. 478 (1978) 5

STATUTES AND RULES:

Tex.R.App.Pro. 100(a) 3, 4, 6

TREATISES:

Stern, Gressman, and Shapiro, *Supreme Court Practice*, 6th Ed. (1986) 1, 2, 5
Wicker, Jeremy C., 31 *Texas Practice* (1985) 3

PETITIONER'S REPLY BRIEF

I. The Federal Due Process Question, Which Forms the Jurisdictional Basis for a Writ of Certiorari, Was Timely, Precisely, and Repeatedly Raised to Both the State Court of Appeals (the Court to Which a Writ of Certiorari is Sought) and the Texas Supreme Court.

Liberty Mutual's Brief in Opposition both mischaracterizes and misconstrues this Court's general rule for preservation of a federal question in state court. The rule is that a federal claim can be considered by the Supreme Court if it has been *either* raised in, *or* expressly decided by, the state court. *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). If a federal point had to be *both* raised in, *and* expressly decided by, the state courts, as Liberty Mutual argues, a state court could immunize itself from Supreme Court review simply by ignoring federal issues. Thus, a state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point. Stern, Gressman, and Shapiro, *Supreme Court Practice*, 6th ed., § 3.21, at 150-51; *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). The federal question is sufficiently preserved if the necessary effect of the state court's judgment has been to deny the claim. Stern, Gressman, and Shapiro, at p. 150. This Court, therefore, has jurisdiction to decide the federal due process question involved in the present case because it was both raised by Mrs. Richards and necessarily resolved against her in the state courts.

Essentially, Liberty Mutual's argument rests on its assertion that the federal issue was waived in the state courts, thereby providing an independent state law ground for the decision and "blocking" this Court's consideration of the federal question. Yet, nowhere have the state courts found that the federal question was waived. Indeed, Liberty Mutual never argued waiver of the relevant federal question at any point before any of the state courts. Now, however, for the first time, Liberty Mutual argues that the Court of Appeals' summary rejection of

Mrs. Richards' federal due process point must have been based on a finding that the point was waived! A state court's summary denial of a properly raised federal claim, however, is necessarily a rejection of the federal question on the merits and necessarily *not* a finding that the point was "waived." *See* Stern, Gressman, and Shapiro, at pg. 150-51. Thus, whether the state courts' summary denial of the federal claim was based on the merits or, rather, based on a procedural default, ultimately turns on whether the federal question was properly raised.

The decisive consideration as to whether a federal question was sufficiently and properly raised is whether the record as a whole shows "either expressly or by clear intendment," that the federal claim "was brought to the attention of the state court *with fair precision and in due time.*" *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (emphasis added). The clear concern is that the state court have a fair opportunity to avoid the alleged federal error. The record in the present case demonstrates that the federal question was precisely and timely raised to the state courts, thereby providing ample opportunity for the state courts to correctly resolve those claims.

A. *The federal due process question was precisely and timely raised to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.*

Contrary to Liberty Mutual's assertions, the federal due process question involved in this case was sufficiently timely and precise under both Texas state procedure and this Court's requirements for certiorari jurisdiction.

Liberty Mutual claims in its "statement of the case" that Mrs. Richards' first opportunity to raise the federal question was in supplemental briefs filed in the Court of Appeals just before oral argument. Nowhere have they explained how that is in any way legally significant. Nor do they argue anywhere that the issue was not timely raised before the Court of Appeals. The absence of such

an argument is itself revealing. Indeed, raising the federal due process claim in the Motion for Rehearing (*See* Petition for Cert., Appendix, at 5a-6a.) adequately preserved the point according to well-settled state procedural law. Where the error originates at the court of appeals, as is alleged in this case, all that is necessary to preserve the point for further appeal in state court is to raise the point of error in a motion for rehearing. Wicker, Jeremy C., 31 Texas Practice § 855 (1985); *Nagle v. Nagle*, 633 S.W.2d 802 n.2 (Tex. 1982) (McGee, J., concurring). The appellate briefs are for the purpose of complaining about *trial court* error; a motion for rehearing is the appropriate vehicle to complain about *appellate court* error. Moreover, a motion for rehearing which complains, not of trial court error, but of appellate court error, falls squarely within Texas' relatively liberal view of the scope of issues permissibly raised in a motion for rehearing—i.e., "any matter determined by a court of appeals." *Tex.R.App.Pro.* 100(a). Additionally, since the essence of a due process claim is a *deprivation* of a protected interest, it is difficult to see how such a claim could ripen until the deprivation, which did not occur here until the court of appeals destroyed Mrs. Richards' cause of action by retroactively applying a change in limitations law. In sum, there is little doubt that the federal question was timely raised in the Court of Appeals, the court to which the writ of certiorari should issue.

Raising the federal question in the Motion for Rehearing not only provided the court of appeals a fair and timely opportunity to resolve the issue, but the point of error was also sufficiently precise to alert the court as to the nature of the federal claim. Nevertheless, Liberty Mutual's brief asserts that the federal point was insufficiently precise on the ground that it was supported by neither argument nor authorities. That is blatantly untrue. The point of error in the Motion for Rehearing expressly states: "The Court of Appeals erred in holding that the statute of limitations barred Mrs. Richards'

cause of action, because the retroactive application of a new statute of limitations standard deprived Mrs. Richards of the due process of law guaranteed by the Fourteenth Amendment to United States Constitution. . . ." *See* Petition for Cert., Appendix, at 6a. Thus, the point of error clearly identifies not only the error, but also the legal argument in support of the error, and the legal authority (the Fourteenth Amendment) that supports the argument. No more is required. The cases cited at page 7 of Liberty Mutual's brief are transparently inapposite. For example, in *Martin v. Cohen*, 804 S.W.2d 201, 202 (Tex.App. 1991, no writ), the court ruled that an appellant's point of error was insufficiently precise because it was merely a general assertion that granting appellee's motion for summary judgment was error. The point of error in *Martin* specified *no reasons* for such a conclusion *nor any law* that supported such a conclusion. Unlike the point of error in the present case, the point in *Martin* was a conclusion without more. The same is true of *Houston Lighting v. Klein Independent School District*, 789 S.W.2d 508, 514 (Tex.App.-Houston [14th Dist.] 1987). Moreover, the specific Texas procedural rule on motions for rehearing—*Tex.R.Crim.App.Pro.* 100 (a)—requires only that the point relied on for the rehearing be "distinctly specified." There is no further requirement. In short, there is nothing in Texas law or procedure that prohibits a litigant from making a self-contained argument in a lengthy point of error that includes not merely a conclusion but, additionally, a legal reason supporting the conclusion, and the identification of a specific law that was violated—here, the Fourteenth Amendment Due Process Clause. Liberty Mutual's argument, if accepted, would require a state litigant to preserve not only federal questions for Supreme Court review but also specific precedent. As this Court has recognized, however, litigants are not bound to follow any particular form of words or phrases in raising federal issues in state court. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). And, ultimately, whether a federal point was adequately raised in the state courts is itself

a federal question. *Street v. New York*, 394 U.S. 576, 583 (1969). Liberty Mutual's hypertechnical reading of state law requirements for preservation of federal error, if accepted, would unduly frustrate this Court's certiorari jurisdiction.

For the foregoing reasons, the federal question was precisely and timely raised in the Court of Appeals, thereby providing ample opportunity for that court to correctly resolve the claim.

B. *The federal due process issue was precisely and timely raised to the Texas Supreme Court on Application for Writ of Error and, further, in Richards' Motion for Rehearing.*

Liberty Mutual nowhere argues that federal questions, if raised on application to the Texas Supreme Court for writ of error, are untimely. Rather, Liberty Mutual again quibbles about the precision with which the federal issue was raised. Nevertheless, as previously demonstrated, the United States Supreme Court requires no particular incantation of words or phrases to raise a federal question. *See Eddings v. Oklahoma*, 455 U.S. at 113-14 n.9. Rather, it is essential only that the litigant bring the federal claim and grounds therefore to the state court's attention with fair precision. *See* Stern, Gressman, and Shapiro, § 3.20, p. 146. As the Court stated in *Eddings*, 455 U.S. at 113-114 n.9, "our jurisdiction does not depend on citation to book and verse." This is particularly true when due process issues are involved. *See* cases collected at Stern, Gressman, and Shapiro, § 3.20, p. 146-147. For example, in *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978), an objection invoking "fundamental principles of judicial fair play" was ruled sufficient to alert the trial judge to petitioner's reliance on due process principles even without explicit reliance on the Fourteenth Amendment. In the present case, Richards' Application to the Texas Supreme Court for Writ of Error expressly characterizes the retroactive application of the new limitations ruling as "[contrary to] considerations of fairness and public

policy," "fundamentally unfair," and "result[ing] in injustice." Application for Writ of Error, at p. 17, 20, 23. Moreover, the Application for Writ of Error complained that such retroactivity deprived Mrs. Richards of a "vested right," citing in support of that argument *Mellinger v. City of Houston*, 3 S.W. 249 (Tex. 1887), where the Texas Supreme Court recognized that the retroactive application of a statute of limitations which extinguishes a vested property interest violates the Due Process Clause of the Federal Constitution. *Id.* at 251-252. Moreover, due to the broad scope of issues permissibly raised in motions for rehearing pursuant to *Tex.R.App.Pro.* 100(a), Mrs. Richards' Motion for Rehearing, which expressly and precisely raised the Fourteenth Amendment Due Process question, was also sufficient—both in time and precision—to present the issue to the Texas Supreme Court.

In sum, the record as a whole clearly shows, as required by this Court's opinion in *Zimmerman*, that the federal claim was brought to the attention of the state courts—both the court of appeals and the Texas Supreme Court—with fair precision and in due time. Any allegations that the state courts were unaware of the claim or did not have a fair opportunity to decide it are specious and disingenuous. Therefore, this Court has certiorari jurisdiction to decide the federal due process question.

II. Far From Being Well-Settled for Over a Century, the Supreme Court has Never Ruled, as Liberty Mutual Claims in its Brief, that a State has Unlimited Authority to Retroactively Apply Changes in Procedural Law That Terminate a Litigant's Constitutionally Protected Property Interest in a Cause of Action.

Liberty Mutual's assertion that this area of due process is exceptional for its clarity and certainty is undercut by its own confusion about the issue, evidenced by its misreading of case law and misunderstanding of relevant due process principles. Although Liberty Mutual concedes that a cause of action is "property" protected by the Fourteenth Amendment, its brief later concludes, at

page 14, that a state's power to terminate that due process protected interest is unlimited—i.e., that the Due Process Clause places no barriers on the state whatsoever! In the same breath, Liberty Mutual contends that such a view is not inconsistent with *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Quite the contrary, such an untenable view of state power—that it automatically and without exception trumps constitutional rights—would not only render *Logan* hollow and meaningless, but it constitutes a fundamentally flawed view of how the Constitution works.

Liberty Mutual's confusion can be traced to its failure to comprehend *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). First, the cases cited at page 9 of Liberty Mutual's brief, including *Great Northern Railroad Co.*, stand only for the unremarkable proposition that the retroactive application of judicial rulings generally poses no constitutional problems. Retroactive application of judicial rulings is neither per se compelled nor prohibited by the Federal Constitution. *Great Northern*, however, in no way involved the retroactive destruction of a litigant's vested property interest in an accrued cause of action. Moreover, this Court's opinion in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), held only that a *defendant* has no due process interest that is affected by a state court's retroactive application of a change in the law which expands the relevant statute of limitations. As quoted in Liberty Mutual's own brief, *Chase* stated, in reference to statutes of limitations, that "their *shelter* has never been regarded as . . . a 'fundamental' right . . . ." *Chase Securities*, 325 U.S. at 314 (emphasis added). Statutes of limitation, of course, only shelter *defendants* and, because limitations periods are by definition arbitrary, a defendant has no interest of a constitutional magnitude in seeing that the period remains unchanged. *See id.* The present case, however, involves not a civil *defendant* but a *plaintiff*. It is important to note that

it is not the *defendant*, but rather the *plaintiff* who is vested with a due process property interest. In other words, the cause of action, which this Court in *Logan* expressly recognized as a species of "property", 455 U.S. at 428, belongs to the plaintiff and not the defendant. Thus, *Chase Securities* contradicts neither *Logan* nor any other proposition in Mrs. Richards' Petition for Certiorari. And *Chase Securities* in no way decided the issue involved in the present case—i.e., whether the retroactive application of a changed limitations period violates the Due Process Clause when it deprives a litigant of her cause of action. Additionally, Liberty Mutual undercuts its own argument with a further quote from *Chase*, in which the Court stated: "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistent with the Fourteenth Amendment, may repeal or extend a statute of limitations. . . ." 325 U.S. at 311 (*citing Campbell v. Holt*, 115 U.S. 600 (1885). Thus, *Chase* implicitly recognized that, where a property interest *is* affected by retroactively applied changes in law, there are due process implications—that is, the state's deprivation must be consistent with the Fourteenth Amendment. And, once again, although a *defendant* may not have a property interest that is affected by changes in procedural law, a *plaintiff* certainly does, in light of *Logan*.

Liberty Mutual's reading of *Logan* is nothing short of extraordinary. According to Liberty Mutual, at page 14 of their brief, a state's power to terminate a cause of action by changing a procedural rule is unlimited by the Fourteenth Amendment. This flies directly in the face of *Logan* and renders meaningless the constitutionally protected interest recognized in *Logan*. What *Logan* says, as quoted at page 12 of Liberty Mutual's brief, is that "[t]he State may erect *reasonable* procedural requirements for triggering a right to an adjudication, [including] statutes of limitations" and that "the State accords due process when it terminates a claim for failure to comply with a *reasonable* procedural or evidentiary rule." *Logan*, 455 U.S. at 437 (emphasis added). The clear im-

plication of that quote is that procedural requirements *not* reasonably applied may violate due process; and Mrs. Richards' claim in this case is that the retroactive destruction of her property interest is not a reasonable application of a procedural requirement and, therefore, cannot survive due process scrutiny.

We wholeheartedly agree that until a cause of action becomes a "final victory" it is subject to intervening changes in procedural rules *which are consistent with due process*. The retroactive application of a change in the limitations period, however, is not consistent with due process (or, at least, that is the issue that Mrs. Richards is asking this Court to decide). Moreover, contrary to Liberty Mutual's assertions, we are not contending that owning a cause of action is the same as owning a final victory, just that a cause of action vests as a property interest prior to final victory—i.e., at the time the cause of action accrues—such that any state deprivation of that interest necessarily implicates due process concerns and must, therefore, pass due process scrutiny.

Ultimately, Liberty Mutual's confusion (and virtually every argument in its brief) can be traced to a fundamental misunderstanding of a simple constitutional point. Due Process analysis involves two distinct steps: (1) whether the state action deprives the individual of an interest protected by the Due Process Clause, thereby requiring due process scrutiny; and (2) if so, whether that state action ultimately survives due process scrutiny. With respect to the first step, a state's destruction of a property interest, such as a cause of action, necessarily implicates due process scrutiny. The first question presented in the Petition for Certiorari would require this Court to decide *when* that cause of action vests as due process "property." On that point, as demonstrated in the petition, there is a sharp split in the lower courts, and one of the views—the only view under which the state of Texas could destroy Mrs. Richards' cause of action without implicating the Due Process Clause—is a view that is fundamentally inconsistent with *Logan*. With re-

spect to the second due process "step", it is certainly the case that the retroactive application of a judicial ruling —perhaps even one that destroys property interests—does not *always* violate due process. But this Court has never decided exactly how that issue is to be decided, what the rules are, or, more specifically, how much process is due. At some point, retroactive application of judicial changes in procedural law is simply unsupported by state interests that are sufficiently important to justify the deprivation of a constitutionally protected interest. As this Court recognized in *Chase Securities*, 325 U.S. at 314, statutes of limitation are, by definition, "arbitrary". That language suggests that a state may have a difficult time identifying an interest sufficient to justify the application of these arbitrary periods in such a way as to defeat vested property rights. Although this Court has decided the retroactivity issue as a matter of federal policy (that changes in limitations periods should *not* apply retroactively), it has never decided the issue as a matter of federal constitutional law. As the Court emphasized in *Logan*, although a state may elect not to confer a property interest in the first instance, the adequacy of procedural safeguards for deprivation of such an interest, once conferred, must be analyzed in constitutional terms. 455 U.S. at 432. This case provides a unique opportunity to do so.

In sum, we are not asking this Court to overrule *Great Northern Railway*, *Chase Securities*, or any other "well-established precedent." And, far from creating confusion, a clear determination of the due process issues involved in this case would resolve many unsettled and important issues that have generated confusion and conflicts in the lower courts. For all these reasons, and additionally for the reasons stated in the Petition for Certiorari, petitioner respectfully urges the Court to grant a writ of certiorari.

Respectfully submitted,

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